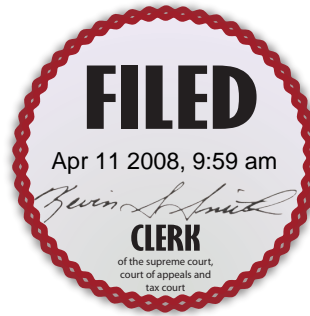


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH B. TAGUE,)	
)	
Appellant/Cross-Appellee/Defendant,)	
)	
vs.)	No. 79A02-0801-CR-33
)	
STATE OF INDIANA,)	
)	
Appellee/Cross-Appellant/Plaintiff.)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0409-FD-41

April 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

In this belated appeal, Appellant-Defendant Joseph B. Tague challenges the trial court's order imposing both the execution of Tague's remaining original sentence and an additional year of probation following the court's finding that Tague violated his probation, which stemmed from his guilty plea for one count of Class D felony Possession of Methamphetamine¹ and one count of Class A misdemeanor Operating While Intoxicated.² Tague alleges that he was not eligible for an additional year of probation because he was required to serve the remainder of the original sentence executed in its entirety. On cross-appeal, the State contends that the trial court improperly granted Tague permission to pursue a belated appeal. Concluding that we lack jurisdiction to review Tague's appeal, we dismiss.

FACTS AND PROCEDURAL HISTORY

On September 27, 2004, the State charged Tague with possession of methamphetamine as a Class D felony and operating while intoxicated as a Class A misdemeanor. Tague entered into a plea agreement whereby he pled guilty to both the possession of methamphetamine and operating while intoxicated charges. In return, the State agreed that "any remaining counts herein shall be dismissed" and that "Counts I and IV shall run concurrently and that the Defendant shall execute one year with all remaining time suspended." Appellant's App. p. 11. On February 9, 2005, the trial court sentenced Tague to three years of incarceration with two years suspended to probation.

¹ Ind. Code § 35-48-4-6 (2004).

² Ind. Code § 9-30-5-2 (2004).

On April 27, 2006, the State filed a petition to revoke Tague's probation after he tested positive for cocaine. At the revocation hearing, Tague admitted to violating the terms of his probation, and the parties agreed that there was one year and fifty-nine days remaining on the original three-year sentence. The trial court ordered that Tague serve the time remaining on his original sentence and imposed an additional year of probation.

On December 1, 2006, Tague filed a pro-se Motion to Correct Erroneous Sentence. The trial court acknowledged Tague's motion and on December 13, 2006, appointed Tague appellate counsel. On October 22, 2007, appellate counsel, having filed nothing on Tague's behalf up to this point, filed a Motion for Belated Appeal. The trial court granted the motion on October 23, 2007, without first conducting an evidentiary hearing on the motion. On October 24, 2007, Tague filed a Notice of Appeal. Tague filed his appellant's brief on January 4, 2008. The State filed its brief, including a cross-appeal on February 6, 2008. Tague did not respond to the State's cross-appeal.

DISCUSSION AND DECISION

The State contends that Tague's belated appeal should be dismissed because the trial court improperly granted Tague permission to pursue a belated appeal. Generally, the decision whether to grant permission to file a belated notice of appeal is within the sound discretion of the trial court and its decision will not be disturbed unless an abuse of discretion is shown. *Moshenek v. State*, 686 N.E.2d 419, 422-24 (Ind. 2007), *reh'g denied*. However, "where, as here, the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only bases for that decision are the allegations contained in the motion to file a belated notice of appeal." *Hull v. State*,

839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005). Furthermore, “because we are reviewing the same information that was available to the trial court, we review the grant of Tague’s motion *de novo*. *See id.*

Tague did not respond to the State’s allegation on cross-appeal that the trial court erred in permitting him to file a belated notice of appeal. In such a circumstance, we may reverse if we find *prima facie* error. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. In this context, *prima facie* is defined as “at first sight, on first appearance, or on the face of it.” *Id.* Consequently, if we find *prima facie* error in the grant of Tague’s petition, we do not have jurisdiction over Tague’s appeal. *Id.*

Tague failed to timely file a notice of appeal and was therefore required to challenge his conviction through the Post-Conviction Rules. *See* Ind. Appellate Rule 9(A)(5). Post-Conviction Rule 2 requires that an eligible defendant show that “(1) the defendant failed to file a timely notice of appeal; (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (3) the defendant has been diligent in requesting permission to file a belated notice of appeal.” Ind. Post-Conviction Rule 2(1)(a).

A petitioner has the burden of proving that he is entitled to a belated appeal by a preponderance of the evidence. *Townsend*, 843 N.E.2d at 974. There are no set standards of fault or diligence, and each case turns on its own facts. *Moshenek*, 868 N.E.2d at 423. Therefore, in order to meet his burden and show that he was entitled to a belated appeal, Tague was required to prove by a preponderance of the evidence that his

failure to file a timely notice of appeal was not due to his own fault and that he was diligent in pursuing the appeal. *See Townsend*, 843 N.E.2d at 975.

In his petition for a belated notice of appeal, Tague asserts that the failure to file a timely notice of appeal was not due to his fault and that he has been diligent in requesting permission to file a belated notice of appeal under the post-conviction rules. Tague, however, presented no evidence to support his petition. Without any evidence regarding the two elements of Post-Conviction Rule 2(1), a petitioner cannot have met his burden of proof. *Id.* at 975.

Accordingly, the trial court erred when it granted Tague's petition for permission to file a belated notice of appeal, and we dismiss his appeal for lack of jurisdiction.

Dismissed.

BARNES, J., and CRONE, J., concur.